

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAN BUTLER,

Plaintiff,

v.

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant.

CASE NO. C06-5373FDB

REPORT AND  
RECOMMENDATION

Noted for March 2, 2007

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed. The parties agree the matter should be remanded for further review. Defendant argues the ALJ made certain errors, requiring only review of those issue on remand, and Plaintiff argues the errors made make it necessary to remand the matter for complete reconsideration by a different ALJ. After reviewing the record, the undersigned recommends that the Court remand the matter for further proceedings with another ALJ assigned to the matter.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, Jan Butler, (Plaintiff), was born in 1951. She has a high school education, and vocational training as a truck driver. She has past work experience as a grant coordinator/writer, a housing survey/researcher, a bus driver, and a customer service clerk. Plaintiff has alleged disability since May 1, 1998, due to a combination of physical and mental impairments, including migraine headaches, depression, back pain, sleep apnea, chest pressure, palpitations, neck pain, and arthritis in her hands and

1 hips. (Tr. 77, 83).

2 Plaintiff filed an application for Social Security Disability benefits in November 1998, which was  
3 initially denied in May 1999. (Tr. 20). She filed a second application for benefits on August 28, 2002. (Tr.  
4 20, 77-79). This claim was denied at the initial and reconsideration levels, and on July 10, 2003 she  
5 requested a hearing. (Tr. 47). Her hearing was held on April 8, 2005. On July 28, 2005 Administrative  
6 Law Judge ("ALJ") issued a partially favorable decision, finding that Ms. Butler's impairments prevented  
7 her from sustaining any work on and after December 10, 2002, but that prior to that date she could have  
8 worked as a folder, general clerk, or mail clerk. The ALJ declined to reopen Ms. Butler's November 1998  
9 claim. (Tr. 16-32). The Appeals Council denied Ms. Butler's request for review on June 16, 2006, leaving  
10 the ALJ's decision as the final decision of the Commissioner. (Tr. 8-10).

11 Plaintiff filed the instant complaint for judicial review on or about July 3, 2006, and in her opening  
12 brief, plaintiff argued the ALJ's decision was not properly supported by substantial evidence and not free  
13 of any legal error. Plaintiff raised several issues regarding the validity of the ALJ's decision. In response  
14 to plaintiff's opening brief and arguments made therein, defendant conceded the ALJ erred in making his  
15 decision. Defendant specifically concedes that the ALJ erred in considering the following issues: (i) the  
16 ALJ failed to properly address Ms. Butler's Personality Disorder; (ii) the ALJ failed to provide a  
17 legitimate medical basis for the inferred onset date; (iii) the ALJ's unfairly restricted Plaintiff's questioning  
18 of the medical expert/adviser, Dr. Slater, at the hearing; (iv) the ALJ made incorrect assertions in his  
19 credibility determination; and (v) the ALJ's needs to address Plaintiff's ability to stand and walk in a more  
20 specific manner in regard to her residual functional capacity. As noted above, the parties agree that  
21 remand for further proceedings is the appropriate remedy in this case.

## 22 DISCUSSION

23 Remand is appropriate where additional administrative proceedings could remedy defects. Id.; Bilby  
24 v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985) (*citing* Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir.  
25 1984)). In her reply to Defendant's concession that remand is the appropriate remedy in this case, Plaintiff  
26 agrees, but also requests that the matter be assigned to a different ALJ when it is reconsidered at the  
27 administrative level.

28 Plaintiff does not reference or cite any authority for the request to have the matter assigned to a

1 different ALJ, and the court's review of case law in the Ninth Circuit does not reveal any directly  
2 applicable standards. The issue has been considered by other appellate courts. The selection of a new  
3 ALJ on remand has been considered to be within the discretion of the Commissioner of the Social Security  
4 Administration. Hartnett v. Apfel, 21 F.Supp.2d 217, 222 (E.D.N.Y.1998) (*citing* Travis v. Sullivan, 985  
5 F.2d 919, 924 (7th Cir.1993)) ( "As a general matter, courts have held that whether a case is remanded to  
6 a different ALJ is a decision for the Commissioner to make." ). There have been several instances,  
7 however, in which courts (including this court) have ordered or recommend that the Commissioner assign  
8 a case to a different ALJ on remand. In Kolodnay v. Schweiker, 680 F.2d 878, 879-80 (2d Cir.1982), the  
9 court remanded to a new ALJ because the original ALJ had failed to adequately consider the medical  
10 evidence. See also, Miles v. Chater, 84 F.3d 1397, 1401 (11th Cir.1996) (remanding to a new ALJ  
11 because of the original ALJ's failure to support his findings with evidence reflected that "the process was  
12 compromised." ); Ventura v. Shalala, 55 F.3d 900, 904 (3d Cir.1995) (remanding to a new ALJ because of  
13 original ALJ's offensive conduct).

14 Remand to a different ALJ is based on the premise that impartiality of the ALJ is "integral to the  
15 integrity of the [disability review process]." Miles, 84 F.3d at 1401 (internal citations omitted). The ALJ  
16 has a special duty to fully and fairly develop the record and to assure that the claimant's interests are  
17 considered. Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983) Remand to a new ALJ is necessary in  
18 those situations which compromise that integrity. Specifically, when the conduct of an ALJ gives rise to  
19 serious concerns about the fundamental fairness of the disability review process, remand to a new ALJ is  
20 appropriate. Factors for consideration in this determination include: (1) a clear indication that the ALJ will  
21 not apply the appropriate legal standard on remand ; (2) a clearly manifested bias or inappropriate hostility  
22 toward any party; (3) a clearly apparent refusal to consider portions of the testimony or evidence favorable  
23 to a party, due to apparent hostility to that party; (4) a refusal to weigh or consider evidence with  
24 impartiality, due to apparent hostility to any party. Sutherland v. Barnhart, 322 F.Supp.2d 282, (E.D. NY  
25 2004); see also 20 C.F.R. § 404.940.,

26 Here, the conduct of the ALJ warrants remand to a new ALJ. Similar to Southerland, *supra*, the  
27 ALJ resisted plaintiff's attorney's attempts to fully question the medical expert at the administrative  
28 hearing. As noted by Plaintiff in her reply brief, the medical expert testified that he agreed with the

1 examining specialist that Ms. Butler had a “marked” degree of impairment in a key work-related activity,  
2 but when Plaintiff’s attorney asked the expert for his opinion regarding onset of this “marked” degree of  
3 impairment, the ALJ interrupted and rephrased the question, asking Dr. Slater to only refer to the record.  
4 (Tr. 567). By doing so, the ALJ prevented Dr. Slater from stating his opinion based on his expertise and  
5 the evidence of record. Plaintiff’s attorney further asked the expert to refer to relevant psychological  
6 reports, but the ALJ further interrupted, refusing to allow the expert to consider medical evidence that  
7 demonstrated the onset of Ms. Butler’s mental illness and her need for significant formal vocational  
8 accommodations to get and keep her job. (Tr. 487-523). This failure to allow the record to be fully  
9 developed raises the concern about the fundamental fairness of the earlier proceedings. Therefore, it is  
10 appropriate to remand the matter a different ALJ.

#### 11 CONCLUSION

12 Based on the foregoing, the undersigned recommends that the Court REMAND the matter to the  
13 administration with the direction that the Commissioner assign a new ALJ. On remand the new ALJ shall  
14 review the record and determine an appropriate onset date for Plaintiff’s disability. The ALJ may also  
15 consider whether or not Plaintiff’s previous application for benefits should be reopened.

16 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the  
17 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P.  
18 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v.  
19 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to  
20 set the matter for consideration on **March 2, 2006**, as noted in the caption.

21 DATED this 9<sup>th</sup> day of February, 2007.

22 /s/ J. Kelley Arnold  
23 J. Kelley Arnold  
24 U.S. Magistrate Judge  
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